IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2007 Session

CITY OF CHATTANOOGA v. JOHN FRANK HARDEN, JR.

Appeal from the Criminal Court for Hamilton County
No. 256714 Douglas Myer, Judge

No. E2006-02373-COA-R3-CV - FILED OCTOBER 31, 2007

The owner and operator of an adult theater/bookstore in Chattanooga was found guilty and fined fifty dollars for violating a municipal ordinance prohibiting the operation of an adult entertainment business without a license issued by the City. Mr. Harden does not deny that he operated his business without the required license but contends that the judgment should be vacated because the City of Chattanooga failed to comply with the requirements of the ordinance by initially refusing to accept his proffered application and after receiving such application, failing to notify him as to whether it had been approved or denied. Although the City's noncompliance is not sanctioned by this Court, we affirm the judgment of the trial court due to the particular facts presented in this case. At the time Mr. Harden submitted his application, a prior court order prohibited the City from issuing a license for an adult entertainment business at the location of the defendant's business until November of 2006 due to previous revocation of a license at that location. Therefore, even had the City followed its procedures, Mr. Harden could not have been granted a license at that location.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John Edward Herbison, Nashville, Tennessee, for the appellant, John Frank Harden, Jr.

Phillip Alden Noblett, Chattanooga, Tennessee, for the appellee, City of Chattanooga.

OPINION

I. Background

John Frank Harden, Jr. is the owner and operator of Boulevard Cinema, Inc., an adult theater/bookstore located at 4100 Rossville Boulevard in Chattanooga. Pursuant to a previous court order, no license could be issued to the operator of an adult-oriented establishment at the location of Mr. Harden's business until at least November of 2006 based upon the revocation of the license of the former owner of the business.

The operation of "adult-oriented establishments," such as Boulevard Cinema, is regulated by Article XIV of the Chattanooga City Code. Section 11-423 of the Code prohibits the operation of an adult entertainment business unless the business has been issued an operating license by the City. Various sections of the Code set forth the application procedure as follows:

> 1) The application for the license shall be made to the city treasurer and "[a] copy of the application shall be distributed promptly by the city treasurer to the Chattanooga Police Department and to the applicant." (Section 11-424 of Article XIV)
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> 2) No license shall be issued unless the Chattanooga Police Department has investigated the applicant's qualifications to be licensed and "[t]he results of that investigation shall be filed in writing with the city treasurer not later than twenty (20) days after the date of the application." (Section 11-426 of Article XIV)
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> 3) "Within ten (10) days of receiving the results of the investigation conducted by the Chattanooga Police Department, the city treasurer shall notify the applicant that his application is granted, denied or held for further investigation." (Section 11-428 of Article XIV)

Despite the prohibition of the operation of an adult-oriented establishment at this location until November of 2006, in June of 2005, Mr. Harden went to the city treasurer's office and attempted to submit an adult entertainment license application form for Boulevard Cinema, but city treasurer employees would not accept the application because of the previous revocation of a license at that location. Mr. Harden returned to the city treasurer's office on August 11, 2005, and re-submitted the application along with a requisite $500 licensing fee. On this occasion, the city treasurer's office accepted Mr. Harden's application for processing, and on August 12, 2005, in accordance with Section 11-424 of Article XIV, the city treasurer's office forwarded the application to the Chattanooga police department for a background investigation.

Upon receipt of Mr. Harden's application from the city treasurer's office, Sergeant Michael

Jenkins, an employee of the vice unit of the Chattanooga police department responsible for conducting background investigations of adult entertainment license applicants, concluded that the application should be denied. Sergeant Jenkins communicated this conclusion to the city treasurer's office by e-mail, but he did not send them anything in writing as required by Section 11-426 of the ordinance. He never spoke to Mr. Harden and did not know whether Mr. Harden was ever notified as to whether his application had been approved or denied. Sharon Morris, an employee of the city treasurer's office, whose job was to supervise and review the processing of applications for adult entertainment licenses, admitted that after Mr. Harden submitted his application on August 11, 2005, the city treasurer's office made no attempt to notify Mr. Harden regarding any decisions as to the status of his application.

Although he had not been issued a license and could not have been granted a license because of the previous court ruling, Mr. Harden opened Boulevard Cinema for business at some time in July or August of 2005. On August 29, 2005, and September 6, 2005, officers of the Chattanooga police department conducted an undercover investigation of Boulevard Cinema and on the latter date, issued Mr. Harden a citation for operating his business without a license in violation of Article XIV. Mr. Harden was found guilty in Chattanooga city court, and upon appeal, he was also found guilty and fined $50 by the criminal court of Hamilton County after a non-jury trial *de novo*. Thereafter, Mr. Harden filed this appeal.

II. Issue

The sole issue we address is whether the trial court's judgment against Mr. Harden for operating an adult-oriented establishment without a license should be vacated because even though the City could not have issued Mr. Harden a license at his establishment due to a previous court order, the City failed to comply with its ordinance when he applied for a license.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993). When a trial court fails to make findings of fact "we must conduct our own independent review of the record to determine where the evidence lies." ***Brooks v. Brooks***, 992 S.W.2d 403, 405 (Tenn. 1999).

B. Constitutional Violations and Remedy

We begin our analysis by noting that Mr. Harden purchased his adult theater/bookstore business from David Franklin who had operated the adult business at the same location as "Cinema

1, Inc." Prior to purchase of the business by Mr. Harden, Mr. Franklin and Cinema 1 were parties appellant in ***City of Chattanooga v. Cinema 1, Inc.***, 150 S.W.3d 390 (Tenn. Ct. App. 2004). In that case, on November 18, 2002, the City permanently revoked Mr. Franklin's license to operate an adult establishment upon grounds that he had failed to prevent patrons of the business from engaging in unlawful sexual activity in violation of Section 11-435 of Article XIV. In their appeal of the chancery court's ruling, Mr. Franklin and Cinema 1 argued that Article XIV was facially unconstitutional because it lacked sufficient guarantees for prompt issuance of a license. Addressing that argument, we first acknowledged that the case involved a "prior restraint" in that Mr. Franklin's exercise of First Amendment rights was dependent upon prior approval of public officials. Citing the United States Supreme Court's decision in ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990), we noted that at least two procedural safeguards are required before a prior restraint scheme will pass constitutional muster:

> 1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; [and] (2) expeditious judicial review of that decision must be available.

With specific regard to the argument that Article XIV did not provide sufficient guarantees for the prompt issuance of a license, we further stated as follows:

> The next constitutional challenge by Defendants is their claim that the City Code is facially unconstitutional because the licensing scheme lacks a guarantee that a license will be promptly issued. The City Code's procedures require the [police department] to investigate the applicant's qualifications and to provide its results to the city treasurer within twenty days of the application being filed. Within ten days of receiving the results, the city treasurer "shall notify" the applicant that the application is granted, denied, or held for additional investigation which cannot exceed thirty more days. After the additional investigation is concluded, the applicant then must be told if the application is granted or denied. Defendants challenge this scheme because the City Code "is silent as to what occurs should the city treasurer fail to act within the 10 day period . . . ."
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> In our opinion, the fatal flaw with this argument is that the Defendants are assuming that the city treasurer at some point in time will not fulfill the mandatory requirements of his or her job. The City Code is quite clear regarding the time frame in which the city treasurer must notify an applicant of the results of the application. Even if the city treasurer does not provide the necessary response in ten days, this does not necessarily mean a constitutional violation will occur. If the licensing scheme as a whole is considered to provide a

> prompt response to the license request when the city treasurer responds within the required ten day period, it is unlikely that the constitutional soundness of this scheme will fall apart if the city treasurer responds in twelve or fourteen days. Of course, if the city treasurer does fail to respond such that constitutional implications arise, then the applicant in that situation can avail himself of remedies available under the law. In order to be facially constitutional, the City Code must establish a prompt time frame for an applicant to be issued a license. The City Code does just that. We do not believe the City Code is rendered facially unconstitutional simply because it does not provide for an eventuality which will never happen unless the mandatory provisions of the City Code are violated by the city treasurer.

Id. at 404-5.

In the instant appeal, Mr. Harden does not maintain that Article XIV is facially unconstitutional, but that the manner of its enforcement caused him to be deprived of constitutional rights. He asserts that the city treasurer's office failed to fulfill its obligations under the ordinance in that 1) it failed to accept his application when he first proffered it on June 3, 2005, and 2) it failed to notify him as to whether the application was approved or denied. Mr. Harden argues that as a result of these omissions, "relevant time periods which should have been triggered by notification to the Defendant of action on his application never began to run." Mr. Harden contends that because the ordinance was not constitutionally applied to him, the trial court's judgment should be vacated. Under the particular facts presented in this case, we do not agree.

The adult entertainment license of the business's prior owner, Mr. Franklin, was revoked on November 18, 2002. Under Section 11-432 of Article XIV "the effective date of a suspension or hearing shall be stayed pending the final outcome of judicial proceedings to determine whether such license or permit has been properly revoked or suspended under the law." Thus, the revocation of Mr. Franklin's license was stayed by then pending legal proceedings that included a hearing before the chancery court, an appeal of the chancery court's ruling to this Court, and a request for permission to appeal that was denied by the Tennessee Supreme Court on November 8, 2004. Accordingly, the effective date of the revocation of Cinema 1's license was November 8, 2004. Section 11-432 of Article XIV provides in pertinent part that "[n]o location or premises for which a license has been issued shall be used as an adult-oriented establishment for two (2) years from the date of revocation of the license." Further, the final order of the chancery court that was later affirmed by this Court in ***Cinema 1***, specifically enjoined "the location . . . at 4100 Rossville Boulevard . . . from receiving any further Adult Oriented Establishment license for a period of two (2) years following the date of revocation of the license unless such period of ineligibility is stayed by further proceedings concerning this matter." In summary, pursuant to both Section 11-432 and the chancery court's affirmed final order specifically applying such section to the location of 4100 Rossville Boulevard, Mr. Harden was precluded from obtaining a license for an adult business operating at that location until two years after the Supreme Court denied permission to appeal on

November 4, 2004 , i.e., until November of 2006. Because it was not within the City's power to issue a license for the Rossville Boulevard location before November of 2006, the City's failure to accept Mr. Harden's license application or process such application in accordance with ordinance requirements did not violate his constitutional right of free expression because this right had already been restricted and was not dependent upon the processing of his application by the City.

Further, we are presented with no authority compelling vacation of the trial court's ruling that Mr. Harden violated the ordinance by operating his business without a license, which violation he admits. In so stating, we are not unmindful of the City's failure to accept Mr. Harden's proffered application in June of 2006 and the City's continuing failure to process the application in compliance with the requirements of Article XIV. These omissions by the City constituted violations of Mr. Harden's constitutional right of due process. Although Mr. Harden could have pursued his legal remedies for this violation, he chose instead to open his business without a license. We do not agree that vacation of the trial court judgment holding Mr. Harden guilty of violating the ordinance is an appropriate remedy in this case. We acknowledge the United States Supreme Court's ruling in ***Carey v. Piphus***, 98 S. Ct. 1042 (1978), referenced by Mr. Harden's attorney in oral argument, for the proposition that a violation of due process demands a remedy notwithstanding the merits of the complainant's substantive assertions. We do not agree that ***Carey*** is supportive of the remedy requested by Mr. Harden. In ***Carey***, public school students brought actions against school officials under 42 U.S.C. § 1983, alleging that they had been suspended from school without procedural due process. Although the Supreme Court held that compensatory damages for violation of procedural due process may not be awarded unless there was proof of actual injury, the Court further held that even when there is no proof of actual injury, a complainant may still be awarded nominal damages, stating as follows:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. at 1054 (citations omitted). However, Mr. Harden did not request nominal damages, which we have hitherto defined to be "damages of the smallest appreciable quantity," ***Mr. Transmission, Division of International Transtech Corp. v. Yount***, No. 88-43-II, 1988 WL 53339, at *7 (Tenn. Ct. App. M.S., filed May 27, 1988), nor did he pursue any separate remedy, but instead requested vacation of the judgment against him for a misdemeanor criminal offense he admits having committed. We cannot award nominal damages that have not been requested. We are guided to this conclusion by the decision of the Sixth Circuit Court of Appeals in ***Ealy v. City of Dayton***, No. 95-3969, 1996 WL 724368 (6th Cir. Dec. 16, 1996), wherein the Court considered the Supreme Court's ruling in ***Carey*** and stated as follows:

> Although the Supreme Court has said that the violation of a

> constitutional right should be "actionable" for nominal damages without proof of actual damages, ***Carey***, 435 U.S. at 266, it has not said that a plaintiff is entitled to such damages, *see* ***Franklin v. Aycock***, 795 F.2d 1253, 1265 (6th Cir. 1986) ("[Plaintiff] *specifically requested* nominal damages and the Supreme Court has declared that at least nominal damages will be awarded, *if sought*, for a denial of procedural due process.")

Id. at *5 (emphasis in original).

While we have not granted Mr. Harden the relief he requested, we are not sanctioning the City's failure to abide by the procedural requirements of Article XIV. We find the City's conduct in that regard to be egregious and inexcusable. However, the fact that the City declined to accept Mr. Harden's application for processing in June of 2005 and subsequently failed to follow required procedure in processing his application did not give Mr. Harden *carte blanche* to violate the law. As it is said, "two wrongs do not make a right." From the time that his initial attempt to file his application was rejected, Mr. Harden had recourse to separate legal remedies that he did not pursue. Our result in this case is dictated by the unusual posture of Mr. Harden's status at the time he applied for a license. A business license was simply not available to him due to the previous revocation of a license at that location.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. In our discretion, costs of appeal are assessed to the appellee, City of Chattanooga.

SHARON G. LEE, JUDGE